North Dakota Attorney General's LAW REPORT

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STATUTE OF LIMITATIONS

In *Stogner v. California*, ___ U.S. ___, the court held that a law enacted after expiration of a previously applicable limitations period violated the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution.

In 1993, California enacted a criminal statute of limitations permitting prosecution for sex-related child abuse cases where the prior limitations period had expired if the prosecution had begun within one year of a victim's report to police. A provision added later made it clear that the law revived causes of action barred by prior limitation statutes.

In 1998, Stogner was indicted for sex-related child abuse committed between 1955 and 1973, when the limitations period was three years. The California appellate courts rejected Stogner's claim that the Ex Post Facto Clause prevented the revival of a previously time-barred prosecution.

In reversing the California courts, the court noted that the California law extended the time in which a prosecution is allowed, authorized prosecution that the passage of time has previously barred, and was enacted after prior limitation periods for Stogner's alleged offenses had expired.

The California law threatened the kind of harm that the Ex Post Facto Clause sought to avoid. The statute of limitations reflects a legislative judgment that after a certain time no quantum of evidence is sufficient to convict. That judgment typically rests, in large part, upon evidentiary concerns that the passage of time has eroded memories or made witnesses or other evidence unavailable.

Historically, legislators, courts, and commentators have long believed it to be well settled that the Ex Post Facto Clause forbids resurrection of time-barred prosecutions. Even where courts have upheld extensions of unexpired statute of limitations, they have consistently distinguished situations where limitations periods have expired. See State v. Davenport, 536 N.W.2d 686 (N.D. 1995).

Although the Supreme Court had not previously spoken decisively on this matter, it has stated that the 5th Amendment privilege against self-incrimination does not apply after the relevant limitations period has expired. That rule may suggest that the expiration of a statute of limitations is irrevocable, for otherwise the passage of time would not have eliminated the fear of prosecution.

The California law subjected an individual such as Stogner to prosecution long after the state has, in effect, granted an amnesty. It retroactively withdraws a complete defense to prosecution after it has already attached, and it does so in a manner that allows a state to withdraw this defense at will and with respect to individuals already identified.

SEARCH AND SEIZURE – EMERGENCY SEARCH

In *State v. Matthews*, 2003 ND 108, 665 N.W.2d 28, the court affirmed the defendant's convictions of possession of a controlled substance with intent to deliver and possession of drug paraphernalia.

A dispatcher received a 911 emergency call from a woman reporting she had received a telephone call that two men were being held at gun point at a farm house in Horace. The individuals being held were identified by the caller.

Officers were sent to one of the individual's business located at his home. The officers observed lights on in the house but no one answered the door when the officers knocked. Officers could hear this individual's telephone ringing inside the home when a dispatcher called to try to make contact but no one answered the telephone. The telephone company was unable to trace the telephone call received by the 911 caller and officers decided to enter the alleged victim's home to gain information or to check for possible victims. Officers entered the home to determine whether the victims or the gunmen were inside and to look for any business records that might identify the location in Horace where the individuals might be held.

While searching the home, officers discovered marijuana on the floor, a scale, plastic packaging for two or three marijuana bricks which appeared to have recently contained marijuana, and in a closet a plastic garbage bag containing 12 to 15 bundles of marijuana. Officers then obtained a search warrant for the house.

In attacking the search, the owner of the home, the defendant, moved to suppress the evidence found during the warrantless search of his home, contending that the information possessed by the officers did not justify an exception to the warrant requirement.

In upholding the search, the court reaffirmed the emergency exception or doctrine to the requirement of a search warrant to permit entry into a residence. The emergency exception does not involve officers investigating a crime but, rather, the officers are assisting citizens or protecting property as part of their general caretaking responsibilities to the public. The emergency doctrine does not require probable cause but must be actually motivated by a perceived need to render aid or assistance. A warrantless search must be strictly circumscribed by the exigencies which justify its initiation and the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries.

The 4th amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within a premises is in need of immediate aid. A 911 call reporting an emergency can be enough to support a warrantless search under the emergency exception particularly when the caller identifies himself or herself.

The emergency exception or doctrine requires that: 1) the police have reasonable grounds to believe that there is an emergency at hand and there is an immediate need for police assistance for the protection of life or property; 2) the search must not be motivated primarily by intent to arrest and seize evidence; and 3) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.

In this case, it was clear from the evidence that the officers had no intent to enter Matthews' premises to arrest anyone or to search for criminal behavior. Rather, the sole motive for entering was to offer aid or assistance to Matthews and the other individual who were alleged to be held at gun point. The district court found the officer's sole intent in entering the residence was to look for the defendant and the other individual or for information which might lead to their location. Entering the defendant's house without a warrant was justified under the circumstances and the scope of the search was reasonable in view of it objectives.

PLEA NEGOTIATIONS – INVOLVEMENT OF THE COURT

In *State v. Dimmitt*, 2003 ND 111, 665 N.W.2d 692, the court reversed an order denying Dimmitt's motion to withdraw his guilty plea and remanded the matter for a change of judge and for further proceedings.

The defendant was charged with class B felony gross sexual imposition for engaging in sexual acts with his 13-year old adopted daughter. The state and Dimmitt's defense attorney entered into plea negotiations and tentatively agreed the state would recommend that the defendant be sentenced to five years imprisonment with all five years suspended except for time served and that he would serve a probation period of five years. However, the defendant's attorney was concerned that the judge would not accept a recommendation. The state's attorney and the defense attorney met with the judge who would be sentencing the defendant and discussed the plea negotiations.

The defendant later appeared before a different judge to change his plea to guilty. The court was told that the defendant's change of plea was based upon an open plea recommendation from the state that Dimmitt would get five years imprisonment which would be suspended for time served and receive five years of probation. Three months later at the sentencing proceedings before the first judge with whom plea negotiations had been discussed, the state recommended that the defendant be sentenced to ten years imprisonment but that he be given credit for time served and the balance be suspended for five years. The court imposed a sentence upon the defendant different from the open plea recommendation that had earlier been made when the defendant pled guilty.

The defendant claimed manifest injustice allowing the withdrawal of his guilty plea resulting from the influence or confusion caused by the sentencing court's involvement in the plea negotiations. The sentencing judge acknowledged having discussions about the plea negotiations with the state's attorney and the defendant's counsel. The defendant's counsel asserted that his client was misled by the negotiation process in which the court involved itself and that his client pled guilty believing the trial judge had agreed to accept the negotiated sentence.

The sentencing judge's involvement in plea negotiations in this case caused confusion and misunderstanding by the defendant as to the effect of his plea, and resulted in a manifest injustice entitling him to withdraw his guilty plea. North Dakota Rule of Criminal Procedure 11(d)(1) provides that the court shall not participate in plea agreement discussions. This case demonstrated the confusion and uncertainty of the voluntariness of the guilty plea which can arise when a trial court violates the rule's strict prohibition from participating in the negotiation process. Until the rule is changed, North Dakota courts may not do what was done in this case.

The court also noted that another troublesome aspect in this case was the state's failure to make the agreed-upon recommendation. If the parties agreed to a nonbinding recommendation of a sentence, the state fulfills its obligation when it makes the specified nonbinding recommendation and the trial court may impose a harsher sentence than the one recommended without allowing the defendant to withdraw the guilty plea. The state, however, recommended imposition of a ten year sentence rather than a five year sentence but that the sentence be suspended except for time already served. It is unknown under the circumstances whether the sentencing judge was influenced by the state's recommendation of a ten-year, rather than a five-year, term of imprisonment. The state claimed that the recommendation was made inadvertently and several weeks after the sentencing proceedings. The state requested the court reopen the sentencing process to allow the state to make the agreed-upon recommendation. The court refused.

It is constitutionally impermissible to hold a defendant to his negotiated plea when promises upon which it was based were not performed. Considering the trial court's impermissible involvement in the negotiation discussion in violation of Rule 11(d)(1) together with the state's failure to make the agreed-upon recommendation, the court concluded that the defendant had shown a manifest injustice requiring that he be afforded an opportunity to withdraw his guilty plea.

The court also ordered that a different judge be assigned to hear further proceedings to cure an improper judicial participation in the plea bargaining process.

CORRECTION OR REDUCTION OF SENTENCE – 120 DAYS TO ACT

In *State v. Steen*, 2003 ND 116, 665 N.W.2d 688, the court affirmed the trial court's order refusing to reduce a sentence.

On June 27, 2002, six criminal judgments were entered and the defendant was sentenced. On July 12, 2002, the court amended five of the six judgments specifying the number of days of credit for time served the defendant was to receive for each case, but did not address the judgment pertaining to a class AA felony.

On October 10, 2002, the defendant moved for a sentence reduction under North Dakota Rule of Criminal Procedure 35(b). On November 12, 2002, the court granted the motion in part reducing the defendant's sentence for the class AA felony from 20 years incarceration with ten years suspended to 20 years incarceration with 18 years suspended for five years.

On November 26, 2002, the state moved to vacate the November 12, 2002, order, arguing the court was without jurisdiction to reduce the defendant's sentence because the order was entered after the 120-day period mandated by Rule 35(b). On December 11, 2002, the court vacated its November 12, 2002, order and denied the motion for sentence reduction.

Rejecting claims that the 120 days should be measured from the orders of July 12, 2002, amending the five other judgments, or that time should be added for mailing, the court concluded that the trial court must act upon a motion to correct a sentence under Rule 35 within 120 days of the date the sentence was imposed to have jurisdiction to grant such a motion to reduce sentence. It is not sufficient that the motion had been filed within the 120 days. Although the defendant's motion had been filed on October 10, 2002 (105 days after the judgment), the court did not rule upon that motion until November 12, 2002. (138 days after the judgment). Once the district court acted beyond the 120-day period permitted by Rule 35(b), the court did not have the power or jurisdiction to reduce the defendant's criminal sentence.

AMENDMENT OF UNIFORM TRAFFIC SUMMONS AND COMPLAINT – JURY SELECTION

In *State v. Schwab*, 2003 ND 119, 665 N.W.2d 52, the court affirmed the defendant's conviction of DUI.

The defendant was involved in a motor vehicle accident involving farm equipment being pulled by a tractor. The Uniform Complaint and Summons issued to the defendant alleged only that she had violated N.D.C.C. § 39-08-01 for driving under the influence of alcohol or drugs. In an amended complaint, the prosecutor also charged her with driving with a blood alcohol content of 0.10 percent or greater.

After jury selection on the day of trial, the defendant's attorney objected to the 0.10 percent or greater instructions, claiming that evidence should be excluded regarding that charge since it was not named in the original citation. The attorney acknowledged he was aware there had been a blood test in the case, but requested a continuance when the court permitted the amendment of the complaint. This request was denied.

The primary purpose of the complaint is to inform the defendant of the charge so the defendant can mount a defense. A court may permit a complaint to be amended at any time before a finding or verdict if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. To violate N.D.R. Crim. P. 3(b), an amendment to a complaint not only must charge an additional or different offense but also must prejudice the defendant's

substantial rights. Absent an abuse of discretion, a trial court's decision on a motion for continuance will not be set aside on appeal.

On July 2, 2002, the defendant filed a demand for discovery and inspection including results of all chemical and field tests administered to the defendant. On September 30, 2002, the defendant received an amended complaint alleging the charge of having a blood alcohol concentration of 0.10 percent or greater. On October 1, 2002, the defendant filed requested jury instructions addressing both driving with a blood alcohol concentration of 0.10 or greater or driving while under the influence. The prosecutor filed the amended complaint with the district judge's approval on October 3, 2002, and the defendant called a forensic scientist at trial to testify about the effect of anhydrous ammonia on the metabolism of blood alcohol.

It was clear that the defendant anticipated her blood alcohol concentration would be an issue and she prepared for trial on both the driving with a blood alcohol level in excess of 0.10 and for driving under the influence of intoxicating liquor. The defendant failed to establish in any way that the amendment of the complaint or the denial of a continuance prejudiced her substantial rights.

The defendant also claimed that improper jury selection process required reversal of her conviction. The defendant's attorney moved to strike for cause all people who knew the driver of the tractor struck by the defendant's vehicle. The trial court granted the defendant's request and excused seven potential jurors who indicated that they knew that individual. After exclusion of these individuals, the court asked the clerk to summon additional jurors. The clerk explained that she did not call people who were related to the driver of the farming equipment, or to the prosecutor, or that worked with the prosecutor previously, who she knew would be excluded. The jurors that did appear came from those potential jurors in the master jury wheel.

The defendant requested a mistrial and, on appeal, claimed, by not following the jury selection plan and process, the trial court discriminated "against men, rural jurors and working folk" and predetermined challenges for cause. In rejecting this claim, the court noted that potential acquaintance with a possible witness is not cause for an implied biased challenge to the prospective juror. A defendant must show in a fair cross section challenge of a jury panel that the group alleged to be excluded is a distinctive group in the community, the representation of the group is not fair and reasonable in relation to the number of such persons in the community, and the group was systematically excluded in the jury selection process. In addition, the defendant must show the exclusion is inherent in the jury selection process used to prove systematic exclusion. Bare assertions of exclusion of distinct groups is insufficient to show under-representation of distinct groups and systematic exclusion of potential jurors.

A party's failure to provide any factual basis showing prejudice or systematic exclusion does not develop the records sufficiently to establish a substantial failure to comply with N.D.C.C. ch. 27-09.1, the Uniform Jury Selection and Service Act. The defendant's bare assertions of systematic exclusion of distinct groups was insufficient to show under-representation of any distinct groups and systematic exclusion of potential jurors.

The court also recognized that the defendant's motion to strike for cause all people who knew the operator of the farm equipment was improper. There was no basis for the trial court to grant the defendant's motion, and this decision created an unanticipated shortage of jurors. Although the trial court should have prescribed a selection procedure for the clerk of court to follow in summoning additional jurors in case of a shortage, the court did agree with the trial court's determinations that the additional jurors were from the panel, the clerk was doing what she could to get people to court that could be available for voir dire without delaying the trial, and that the clerk's screening process was nothing more than trying to make sure that enough people would be present to pick a jury. The defendant showed no prejudice from the process employed by the trial court and the clerk of court to remedy the shortages caused by granting the defendant's improper motion.

NORTH DAKOTA RULE OF COURT 3.2 NOTICE – DUE PROCESS

In *State v. Ehli*, 2003 ND 133, 667 N.W.2d 635, the court vacated a trial court's order amending conditions of the defendant's probation.

The defendant pled guilty to the offense of continuous sexual abuse of a child, receiving a sentence of imprisonment with a portion of the sentence suspended. Two conditions of his probation were that he not have contact with children under the age of 18 and to not use the Internet.

In February of 2003, nearly four years after his conviction, the defendant requested an amendment of the conditions of probation to allow him to visit his sons and to remove the prohibition on his use of the Internet. The state did not respond to this request. The district court amended the conditions of probation eliminating the Internet restriction and non-contact with minors provision relating to members of the defendant's family.

On March 20, 2003, the state served a motion for reconsideration of the order amending conditions of probation stating that it was submitted pursuant to the provisions of North Dakota Rule of Court 3.2. The court granted the state's motion in a one sentence order dated March 25, 2003, vacating its earlier order and reinstating the original conditions of probation.

The defendant claimed he was deprived of his right to establish a relationship with his children and was not afforded an opportunity to respond to the state's motion. The state served its motion on March 20, 2003. The defendant had 10 days to file an answer brief. The answer brief was served by mail on March 25, 2003, and received by the state on March 27, 2003. The copy filed with the district court bore the date stamp of the district court administrator of March 27, 2003. The district judge's initials with the date "3/27/03" were at the top of the first page of the defendant's brief. Although the records show that the defendant served a timely answer brief, the district court issued its written order granting the state's motion on March 25, 2003, before it had received the defendant's brief.

A person is denied due process when defects and the procedure employed might lead to a denial of justice. The fundamental requirements of due process are notice and a fair opportunity to be heard. Due process requires that parties be afforded a meaningful opportunity to present objections. A judgment entered on motion of one party without proper notice and the opportunity to be heard by the other parties is contrary to the fundamental principles of justice.

Although the defendant received proper notice and served a timely answer brief to the state's motion, the district court did not wait for the defendant's answer brief before ruling on the motion. The court issued its order granting the state's motion amending the conditions of probation before the time for filing an answer brief had expired. The procedure employed in this case failed to afford the defendant a fair and meaningful opportunity to respond to this state's motion and violated the defendant's due process rights and North Dakota Rule of Court 3.2.

HEARSAY – VICTIM PRIOR OUT-OF-COURT STATEMENTS

In *State v. Stoppelworth*, 2003 ND 137, 667 N.W.2d 586, the court affirmed the defendant's conviction of aggravated assault and reckless endangerment.

An injured person arrived at an emergency room with a slashed throat and a cut on his hand. This person initially refused to identify his attacker, telling a nurse and a police officer that he did not want to be a snitch or a narc. Later, however, this individual told the officer and the nurse that the defendant had cut his throat. He also told a friend who was present at the hospital that the defendant had done it. In interviews after being released from the hospital, the individual told a deputy sheriff and a detective that the defendant had cut his throat.

The defendant was charged with attempted murder, aggravated assault, and reckless endangerment. At the preliminary hearing, the victim testified he was too intoxicated the night of the incident to remember who had attacked him and he did not remember his statements to the police. The defendant filed a motion in limine seeking to exclude the victim's statements identifying the defendant as the assailant and arguing the statements were hearsay. The trial court held the statements were prior statements of identification which are admissible under North Dakota Rule of Evidence 801(d)(1)(iii).

At trial, the victim testified he did not remember who had cut his throat and he did not remember identifying the defendant as the attacker in prior statements at the hospital and to the police. The court admitted evidence of the victim's statements made to law enforcement, the nurse, and the friend identifying the defendant. In addition, the court also admitted into evidence photographs taken at the hospital depicting the victim's injuries.

A trial court has broad discretion in evidentiary matters and a trial court's decision to admit or exclude evidence will not be overturned unless the court abused its discretion. This abuse of discretion standard applies when reviewing a trial court's evidentiary rulings under the hearsay rule.

North Dakota Rule of Evidence 801(d)(1)(iii) declares prior statements of witnesses as not hearsay if the statement is "one of identification of a person made after perceiving the person" if the declarant has testified at the trial or hearing and is subject to cross examination concerning the statement. This rule allows admission of evidence of prior identification of an assailant when the witness or victim is unable or unwilling to identify the assailant at trial. In this case, the victim testified at trial and was available for cross examination. His prior statements identifying the defendant as his assailant were not hearsay under this rule. The trial court did not abuse its discretion in admitting evidence of the victim's prior statements.

The court also rejected the defendant's claim that the trial court committed error in admitting photographs depicting the victim's injured neck and hand, by arguing that the probative value of the photographs were substantially outweighed by the danger of unfair prejudice. Photographs may be permitted in criminal trials at the district court's discretion even if the photographs could have the additional effect of exciting the emotions of the jury. When photographs are relevant or aid a witness's testimony, even gruesome pictures are admissible for the purpose of offering proper proof. Although the photographs in this case were somewhat graphic, they accurately depicted the victim's injury and the trial court did not abuse its discretion in determining that the evidence was relevant and that its probative value was not substantially outweighed by the danger of unfair prejudice.

MIRANDA – PRESENCE OF PARENT –
MINOR'S CONSUMPTION OF ALCOHOL WHILE DRIVING A VEHICLE

In *Interest of Z.C.B.*, 2003 ND 151, ____ N.W.2d ____, the court affirmed a juvenile court order finding the minor having committed the unruly act of minor in possession or consumption of alcohol while driving.

The minor was driving a vehicle with three friends as passengers when he was stopped by a police officer for a tinted windows violation. The officer smelled alcohol through the vehicle's open window and asked if any of them were 21 or if they had been drinking. They all said that they had not been drinking but one passenger indicated that "something was spilled on him."

The officer asked the minor driver to leave the vehicle and the officer could still smell alcohol when the driver was outside the vehicle but the odor was not as strong. The officer told the driver about the odor and asked him to be honest and tell him if he had been drinking. The driver stated that he "had a sip" at which time he was arrested and charged with being a minor in possession or consumption of alcohol while driving a motor vehicle. No alcoholic beverages were found in the vehicle or on any of the passengers.

The minor driver first argued that his statement to the officer after leaving the vehicle should not have been admitted into evidence because he was detained and interrogated without receiving his Miranda rights and should not have been questioned without a parent present.

In rejecting these claims, the court noted that Miranda warnings must be given when a person is subjected to custodial interrogation. The tests for custodial interrogation is how a reasonable person in the suspect's position would have understood his situation. The degree of restraint and compulsion must be determined by evaluating the entire situation.

Routine traffic stops are generally not considered custodial situations. A suspect is not subject to custodial interrogation merely because an officer asks a question that may establish an element of the crime charged. Mere investigatory focus does not require the giving of the Miranda warnings. In addition, an officer's state of mind is not controlling but one of many factors which, if made known to the person under interrogation, is used in determining whether a custodial interrogation has occurred.

The driver could reasonably expect to answer questions regarding alcohol consumption after being stopped while operating the vehicle. When an officer detects an odor of alcohol emanating from a vehicle, having a driver exit the vehicle and asking whether he has been drinking constitutes a common sense investigation and does not amount to custodial interrogation for Miranda purposes. The mere fact the question regarded the consuming element of the offense of minor in consumption does not require a finding of custody.

The court also rejected the minor driver's claims that he should not have been questioned without a parent present because minors are members of special class that may require additional legal protections.

A juvenile's right to be represented by his parent or guardian often arises in situations involving a juvenile's waiver of his right to counsel. A juvenile has a right to counsel at custodial stages of proceedings and that right to counsel may not waived unless the child is represented by his parent, guardian, or custodian.

The driver's statutory right to counsel under N.D.C.C. § 27-20-26 had not arisen when he was questioned by the officer because he was not in custody. Although minors may require additional legal protection in some circumstances, the fact that the driver was a minor does not give him the extra protection he sought in this case. The Uniform Juvenile Court Act delineates when a juvenile has a right to additional representation protection and the driver was not in any of the stages of the proceeding enumerated by section 27-20-26 when he was questioned by the officer.

The court found no authority granting a juvenile a right to have a parent present during routine questioning at an ordinary traffic stop. In addition, N.D.C.C. § 27-20-26 was revised in 1995 from granting juveniles a right to counsel at all stages of any proceedings to its current state, granting juveniles a right to counsel at custodial, post-petition, and informal adjustment stages of proceedings. To grant the minor a right to counsel or to require the officer to contact one of his parents before asking any questions would effectively ignore the 1995 amendments, by granting the minor driver additional representations and protections that were removed from the statute. The officer was not required to contact the minor driver's parents before asking common sense investigatory questions and the driver's statement to the officer was properly admitted because he was not subject to custodial interrogation when it was made.

The court also rejected the minor driver's claim that there was no credible evidence he possessed or consumed alcohol while driving.

The officer testified it was possible he smelled a nonalcoholic beverage but he informed the driver that he smelled alcohol and asked him if he had been drinking. The minor responded that he had a sip. The trial court found that both parties understood the conversation concerned alcohol and the minor's response indicated the sip was of alcohol. There being appreciable weight to the trial court's finding, the court found no evidence indicating the conversation concerned anything other than alcohol consumption. When the officer informed the minor that he could smell alcohol, the ensuing question regarding drinking can only be construed to concern drinking alcohol and the minor's answer can only be interpreted to mean that he had a sip of alcohol. The minor's answer and the odor

of alcohol were enough to establish that he was a minor in consumption of alcohol because N.D.C.C. § 5-01-08 is a strict liability offense.

N.D.C.C. § 39-06-01.1 requires the director of the North Dakota Department of Transportation to cancel the license of any individual who has committed an alcohol-related offense while operating a motor vehicle if the offense was committed while the individual was a minor and the individual admitted to, or was found to have committed, the violation. In this case, the minor was charged with being a minor in possession or consumption of alcohol while driving, in violation of N.D.C.C. §§ 5-01-08 and 39-06-01.1. There is no material distinction between consuming while driving and having recently consumed while driving. In either case, the minor is being charged with driving after having consumed alcohol.

The provisions requiring the DOT director to cancel a minor's driver's license if he has committed an alcohol-related offense while driving was enacted to enhance motivation for safe driving. There is nothing in the statute or its legislative history indicating it was specifically directed at the problems of minors drinking while they were driving while ignoring minors who drink before driving.

The minor driver was in violation of N.D.C.C. § 5-01-08 when he was stopped by the officer. It is irrelevant that no proof was offered that he physically consumed the alcohol while he was driving because he was still violating the statute and therefore committing an alcohol-related offense while he was driving. This is what N.D.C.C. § 39-06-01.1 requires. To allow otherwise would frustrate the intent of that provision.